QUESTIONS PRESENTED

(1) Whether a State imposes a discriminatory tax on railroad property, in violation of section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, if it exempts any class of property not owned by the railroad from ad valorem property taxes;

(2) If the State's tax is discriminatory, whether the railroad is entitled to be exempt from all ad valorem property taxes.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

DEPARTMENT OF REVENUE OF THE STATE OF OREGON, RICHARD A. MUNN, in his Capacity as Director of the Department of Revenue of the State of Oregon,

Petitioner,

v.

ACF INDUSTRIES, INC.; GENERAL AMERICAN TRANSPORTATION CORPORATION; GENERAL ELECTRIC RAILCAR SERVICES CORPORATION, PULLMAN LEASING COMPANY; RAILBOX COMPANY; RAILGON COMPANY; TRAILER TRAIN COMPANY; UNION TANK CAR COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *ACF Industries Inc., et al. v. Dept. of Revenue of the State of Oregon*, 961 F.2d 813 (1992). The district court's opinion is unreported.[1]

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[1] The opinions of both the Ninth Circuit and the district court are reproduced in the appendix to the petition for certiorari.

JURISDICTION

28 U.S.C. § 1254(1) (1982) gives the Court jurisdiction to issue a writ of certiorari to the federal courts of appeals. The court of appeals' judgment was entered on April 8, 1992. A timely petition for certiorari was filed within 90 days. *See* 28 U.S.C. § 2101(c); Supreme Court Rule 13.1.

STATUTES INVOLVED

49 U.S.C. § 11503, the Railroad Revitalization and Regulatory Reform Act of 1976, provides, in pertinent part:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.
>
> (3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

"Commercial and industrial property" is defined in 49 U.S.C. § 11503(a)(4) as:

> property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax.

STATEMENT OF THE CASE

1. This case was brought pursuant to 49 U.S.C. § 11503, which is a part of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4R Act").[2] Under the statute, Congress has declared that specific taxing acts "unreasonably burden and discriminate against interstate commerce" and that the States may not engage in any of those acts. The statute forbids States to assess property (both real and personal) at a higher fraction of fair market value than they assess other "commercial and industrial property" (§ 11503(b)(1)); to levy or collect a tax based on such an assessment (§ 11503(b)(2)); and to tax rail transportation property at a higher rate than other "commercial and industrial property" (§ 11503(b)(3)). Commercial and industrial property thus forms the comparison class for purposes of testing *ad valorem* property taxes for rate or assessment discrimination. The class includes all property, except land used primarily for agricultural purposes or for growing timber, that is devoted to commercial and industrial uses and that is "subject to a property tax levy." § 11503(a)(4). A fourth and final provision of the Act prohibits discriminatory taxes in a less specific way: it forbids imposing "another tax" that discriminates against a rail carrier. § 11503(b)(4). This subsection, unlike the others, does not specify what types of property or other taxes

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[2] The statute was section 306 of the final bill and was originally codified at 49 U.S.C. § 26c. Congress later recodified it as 49 U.S.C. § 11503. In the recodification, Congress altered the language of section 306 slightly. As this Court observed, Congress specifically directed that any changes due to the recodification "may not be construed as making a substantive change in the laws replaced." § 3(a), 92 Stat. 1466. *Burlington No. Ry. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 459 n.1 (1987). Both the original version of the statute (§ 306) and the current version are reproduced in full in the appendix to the petition for certiorari.

are to be compared in testing whether the treatment of railroad property is "discriminatory."[3]

2. All real and personal property in Oregon, except property expressly exempted, is subject to *ad valorem* taxation and must be assessed and taxed "in equal and ratable proportion." Or. Rev. Stat. § 307.030 (1987). All property must be valued at 100 percent of its fair market value. Or. Rev. Stat. § 308.250 (1987). Oregon taxes railroad cars as "tangible personal property." Or. Rev. Stat. § 307.030 (1987).

Certain classes of business personalty are exempt from *ad valorem* taxation, including agricultural machinery and equipment, business inventories, livestock, poultry, bees, fur-bearing animals and agricultural products in the possession of farmers. Or. Rev. Stat. §§ 307.325, 307.400 (1987). Motor vehicles are exempt from property taxation but are subject to fixed registration fees in lieu of property taxes. Or. Rev. Stat. § 308.585 (1987). Standing timber is also expressly exempt from *ad valorem* taxation, but is subject to a severance tax when it is harvested. Or. Rev. Stat. §§ 307.010(1) (1987), 321.005 *et seq.* (1987).

3. Plaintiffs are corporations, commonly known as "carlines," that lease railroad cars to railroad carriers. They own only personal property. The plaintiff carlines brought this action pursuant to section 11503(b)(4) seeking a declaration that Oregon's property tax unlawfully discriminates against them because it exempts some categories of personal property from taxation (primarily business inventory and standing timber) without giving the same tax exempt status to the property carlines own. Carlines sought to enjoin Oregon from collecting any property taxes on their personal

[3] The original language of section 306 forbade the "imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this chapter." § 306(1)(d). The recodified language changed the reference to "any other tax" and it became "another tax."

property. In pursuing their claim, carlines did not rely on subsections (b)(1)–(3), which are directed by their terms to discriminatory *ad valorem* property taxation. They sought relief only under subsection (b)(4), the general provision prohibiting "another tax" that discriminates against a rail carrier.

4. The district court entered judgment for the State after concluding that carlines did not meet their burden to show that Oregon's tax on railroads is discriminatory. The district court concluded that Oregon's system of exemptions is neutral in application and is not a pretext for discriminatory taxation. Although the trial court suggested that at some point a State's system of property tax exemptions might become "discriminatory" by exempting most classes of personal property, it found that Oregon's tax system did not approach that threshold.

5. The Ninth Circuit reversed. The court concluded that the sections of the statute that expressly address *ad valorem* taxes were irrelevant to carlines' challenge. As a result, the Ninth Circuit held that by casting their claim as one directed to "discriminatory exemptions" rather than to discriminatory assessment ratios or rates, carlines could bring their suit under § 11503(b)(4)(prohibiting another tax that discriminates against rail carriers). The court held that exempt property may freely "enter the equation" in testing a State's property tax for discriminatory treatment of railroads.

The Ninth Circuit found that at least 25% of all real and personal property in Oregon is tax-exempt. The court, however, expressly disagreed with the district court's analysis that a State's property tax exemptions are "discriminatory" only if the percentage of exempt property is high enough to suggest that railroads are targets of special taxation. Instead, the court of appeals concluded: "[A]ny exemption not also available to railroads [with a possible *de minimis* exception] violates the statute." The Ninth Circuit held that carlines are entitled to the same total exemption "preferred property

owners" enjoy, and it enjoined Oregon's collection of any *ad valorem* tax on carlines' transportation property.

SUMMARY OF ARGUMENT

Carlines may not rely on section 11503(b)(4) to challenge Oregon's property tax as discriminatory. The first three subsections of the statute are directed in detailed terms to the bases for challenging personal and real property taxes. Subsection (b)(4) follows those subsections, and forbids a State from imposing "another tax" that discriminates against railroad property. Under the plain language of the statute, the provision is available only to test "other" allegedly discriminatory taxes. It does not provide an additional or different basis for challenging a State's general property tax. The words Congress used are as plain as language can be.

If resort to legislative history is appropriate to determine the statute's scope, the legislative history confirms that Congress said what it meant. Congress added the final provision at the request of representatives of the railroad industry. They specifically asked that the language be added so railroads that pay taxes other than property taxes (*e.g.*, gross receipts taxes) would have the protection of the statute. Nothing in the legislation history suggests any broader purpose. Courts, including the Ninth Circuit, that find in this subsection a congressional purpose to prohibit tax discrimination against railroads in "all its guises" have misread or misunderstood the language and its history.

Even if subsection (b)(4) can be used to challenge a property tax on transportation property, the statute forecloses a claim that the tax is discriminatory merely because other types of property are exempt. In drafting the provisions that address rate and assessment discrimination, Congress deliberately chose to give States latitude to promote economic development, industrial growth, natural resource protection, and similar policy objectives through their tax

structures. Congress determined that the tax treatment of transportation property should be compared only to similarly situated property, not all property in a taxing district. Congress structured the comparison class accordingly, and its view of what kind of property was similar was precise: not land used primarily for timber and agricultural purposes; only commercial and industrial property; and only property subject to a property tax levy.

The history confirms the importance of the narrow comparison Congress built into the statute. The States repeatedly pressed Congress to preserve their authority to determine what is taxed and what is not. Congressional members were consistently responsive to the States' concerns, even to the point that some sought and obtained assurances that exemption policies in their home States would not be affected. The railroad industry raised few objections to narrowing the comparison class, and it raised no objection to narrowing the comparison to exclude tax exempt property. The statute itself makes clear that while Congress set out to change some State policies, it was equally determined to leave others alone. That choice cannot be respected if a claim of "exemption discrimination" may be brought under subsection (b)(4).

The statute should not be judicially broadened to meet assertions that States may abuse the authority Congress deliberately left untouched. Given the States' heavy dependence on property taxation, fears that States will tax only railroads are more imagined than real. In any event, arguments to expand the statute should be presented to Congress in the first instance. The Court's approach should be cautious where, as here, the statute is an exception to Congress's more encompassing policy of federal non-interference in matters of State taxation. Finally, because the States must look to the political process to protect fundamental interests of this kind, any doubt or uncertainty in the legislative record must be resolved in the States' favor.

But even if a State's system of *ad valorem* tax exemptions can be challenged as discriminatory, the Ninth Circuit was wrong in holding that a tax on transportation property is *per se* discriminatory if any other property is exempt. Congress expected that States would both tax transportation property and exempt other categories of property from taxation. Preserving that authority was part of the political compromise Congress struck. Necessarily, a state tax on transportation property cannot be invalidated solely on the basis that there is other property in a taxing district that the State does not tax.

The structure of the statute, its history and Commerce Clause principles all suggest the proper test for discrimination. The question is not whether some other property has been specially favored, but whether transportation property has been specially burdened. A State tax satisfies this test if it is facially neutral and generally applicable, and it does not fall on railroads alone or as part of an insular disadvantaged group. If railroads are taxed as part of a large and diverse group of local and out-of-state taxpayers, there is no discriminatory burden on interstate commerce.

Oregon's tax satisfies the proper test. It is levied pursuant to a neutral *ad valorem* tax structure that applies to a wide range of property and a large group of taxpayers. The major categories of personal property that Oregon exempts are the precise types of property Congress intended to permit States to have authority to tax specially. The exemptions reflect real and substantial differences based on the character of the property; they are not pretexts for discriminatory taxation of railroad property. As the district court correctly found, Oregon's tax on transportation property is not discriminatory.

Even if on some theory Oregon's tax structure can be deemed discriminatory, the Ninth Circuit awarded carlines far more than they were entitled to receive. The protection from rate and

assessment discrimination is carefully drawn to equalize taxes on transportation property, not to strike them down in full. Railroads are not entitled to seek the lowest tax rate or assessment given to other property in the comparison class. Rather, a state tax may be enjoined only insofar as it exceeds the hypothetical average tax levied on similar property in the taxing district. Where, as here, the challenge is to a tax levied pursuant to a State's general *ad valorem* tax structure, the statute does not authorize relief in the form of total freedom from taxation.

ARGUMENT

I. Introduction.

This case presents the Court with two related questions: (1) when, if ever, does a State's exemption of some categories of property from its general property tax system render its tax on railroad property discriminatory; and if the tax is discriminatory, (2) when, if ever, is the appropriate remedy to relieve railroad property of all taxation? Carlines and the Ninth Circuit gave the same answer to both questions: "Always."[4]

Carlines' complaint relied exclusively on subsection (b)(4), the provision directed to "another tax" that results in discriminatory treatment of railroads. Implicitly, they disavowed reliance on subsections (b)(1) through (b)(3), which address real and personal property taxes specifically. Presumably, this narrow casting of the claim was by design. In other cases, lower courts uniformly have concluded that subsections (b)(1) through (b)(3) do not permit the

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[4] Carlines' complaint detailed the categories of personal property that Oregon exempts from *ad valorem* taxes. J.A. 7, ¶ 21. In their first cause of action, carlines alleged that none of their personal property qualifies for exemption. J.A. 8, ¶ 31. Carlines then asserted: "the imposition of *any* personal property tax on plaintiffs, when the personal property of other taxpayers in Oregon is not taxed, violates Section [11503(b)(4)]." J.A. 8, ¶ 33 (emphasis added). Thus, carlines advocated the precise *per se* rule the Ninth Circuit adopted: "any exemption not also available to railroads violates the statute" and that carlines are entitled to total exemption.

tax treatment of railroad property to be compared to the treatment of exempt property. Rather, Congress deliberately designed the comparison class to exclude property that States exempt from taxation altogether. *E.g.*, *Dept. of Revenue, State of Fla. v. Trailer Train Co.*, 830 F.2d 1567, 1571-73 (11th Cir. 1987)(citing and discussing representative cases). Indeed, one of the plaintiff carlines in this lawsuit (ACF) had challenged identical features of Arizona's tax system on the same theory advanced here, except that suit was brought under subsection (b)(1).[5] Having lost that challenge in the same circuit in which this case would be brought, ACF and the other plaintiffs not surprisingly did not rely on subsections (b)(1) or (b)(3) again. Instead, they challenged Oregon's property tax as "another tax" that results in discriminatory treatment of their transportation property, in violation of subsection (b)(4).

II. The Plain Language of Subsection (b)(4) Limits it to Non-Property Taxes.

Carlines were not entitled to challenge Oregon's *ad valorem* taxes on their property under subsection (b)(4). On its face, and by virtue of its straightforward text, that subsection is limited to taxes other than property taxes. Carlines were obligated to fit their challenge within the terms of subsections (b)(1) to (b)(3), or not bring it at all.

Section 11503 declares certain acts in taxing transportation property to unreasonably burden and discriminate against interstate commerce. It then lists four prohibited actions. The first three are directed specifically to state *ad valorem* property taxes, both real and personal. The first subsection prohibits a State from assessing

[5] In the suit, ACF claimed that business inventory, which Arizona exempts from taxation, should be part of the comparison class in determining whether assessment ratios applied to railroad property were excessive. The primary difference between that lawsuit and this one is that in the Arizona litigation, the carlines claimed entitlement to a lower tax rather than to no tax at all. *ACF Industries, Inc. v. State of Ariz.*, 714 F.2d 93, 94 (9th Cir. 1983).

transportation property at a ratio that exceeds the ratios applied to other commercial and industrial property. The second prohibits levying or collecting a tax based on an excessive assessment. The third prohibits applying a tax rate to transportation property that is higher than the tax rate applicable to commercial and industrial property. Subsection (b)(4) is the last of the four prohibitions, and forbids a state from imposing "another tax" that results in discriminatory treatment of a common carrier.

The word "another" is a word of contrast; it necessarily takes its meaning from what precedes it. Here, what precedes it are three subsections that explicitly and in detailed terms address state *ad valorem* taxation of real and personal property. If the words "another tax" are to have any content at all, they must be a reference to taxes other than property taxes levied on real and personal property. *Cf. Gordon v. Appeal Tax Court*, 44 U.S. (3 How.) 133, 147 (1845) (Maryland's promise not to impose "any further tax" on chartered banks should be read in a common sense way to refer to any tax other than the franchise tax described previously in the statute). There is nothing technical or intricate about the idea the language conveys. The first three subsections provide the bases on which property taxes may be challenged. The fourth provides a basis to challenge other taxes. That is the most natural reading of the language; any other requires greater effort.[6]

[6] The most recent lower court decision considering this question similarly has concluded:

> Section (b)(4), the last in a series of prohibited practices, follows §§ (b)(1) through (b)(3) which exclusively address property taxes. Because § (b)(4) follows three sections exclusively addressing property taxes, the "any other tax" language unambiguously relates to taxes other than property taxes. This plain reading of § 11503(b)(4) comports with the Supreme Court's ruling in *Burlington Northern Railroad Company v. Oklahoma Tax Commission*, . . . indicating that the express meaning of the 4-R Act should be interpreted on its face

(continued...)

Of course, if the words clearly and unambiguously provide a challenge only to taxes other than property taxes, this Court's task of interpreting the statute is at an end. *Burlington No. Ry. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987)(in the absence of a clearly expressed legislative intention to the contrary, the language of the 4R Act must be regarded as conclusive). It is not the Court's prerogative to assess whether Congress made a wise or an unwise policy choice, or whether it was far or short-sighted in its vision. Nor is it the Court's role to cure perceived deficiencies through judicial interpretation. Giving effect to "plain language" is more than a mechanical rule of construction. The rule is, instead, an important accommodation of the legislative process itself:

> If we do not take a legislative body at its word, we run the risk of substituting our own normative (and inherently nondemocratic) views, of disrupting the strange political trade-offs that make democracy possible, of — worst of all — polluting a public language of relatively fixed meaning and reference, a language necessary for the public discourse we call self-government.

Kansas City Southern R. v. McNamara, 817 F.2d 368, 373 (5th Cir. 1987)(construing section 11503).

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[6] (...continued)

> where the terms of the statute are unambiguous. The "any other tax" wording in § 11503(b)(4) compels the conclusion that such section applies only to taxes other than property taxes. . . . To conclude otherwise requires interpreting the word "other" out of § (b)(4). Therefore, plaintiff's assertions of a violation of § (b)(4) by the personal property exemptions contained in Tennessee law is contrary to the plain meaning of such section.

CSX Transportation, Inc. v. Tenn. State Bd. of Equalization, 801 F. Supp. 28, 36 (M.D. Tenn. 1992)(on remand).

Concededly, statutory language is rarely free from all doubt.[7] This language, however, is as plain as language can be. To read it to permit a further or different challenge to *ad valorem* taxes would require changing the words, not construing them. The word "another," at a minimum, would have to be excised from the text and the word "any" would have to be inserted in its place.[8] That is not how Congress wrote the provision, nor is it the plain meaning of text that is there.

III. An Overview of the Statute's History.

If the court concludes that it is appropriate to examine the statute's history to determine Congress's intent behind it, that examination only confirms that Congress meant what it said. Review of the history is not quick work, however. It spans a full 15-year period and was the outgrowth of a long series of bills on both the House and the Senate side. But the effort is worthwhile, for with each subsequent hearing, Congress's objective became more refined.[9] Subsection (b)(4) was added to the legislation in the

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[7] *Cf. National R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. ___, 112 S.Ct. 1394, 1402 (1992)(few phrases in a complex statutory scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context).

[8] *See United States v. Nordic Village*, 503 U.S. ___, 112 S.Ct. 1011, 1015 (1992) (statutes must, if possible, be construed to give every word some operative effect).

[9] Failed legislation often is not a reliable guide to legislative intention. Here, however, the several bills and hearings devoted to what ultimately became section 11503 were part of an on-going process of deliberation. Members of Congress, sponsors and opponents alike, from one hearing to the next and one year to the next, frequently referred back to the earlier bills, often introduced written testimony and documentation from prior hearings, and occasionally cross-referenced the earlier congressional records. In general, each new bill and hearing was treated as a continuation of the last. *See, e.g., Hearings on S. 2362 [and related bills] Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 280, 284 (1972)(statementof Philip Lanier, Vice-President, Louisville and Nashville

(continued...)

final two years of deliberations. By then, the section as a whole had taken near-final form. Proponents and opponents had actively debated which state taxing practices would violate the Act and which would not. Congress had largely settled those significant policy issues. The 15-year period thus lays essential groundwork for understanding subsection (b)(4), providing critical insight into why it was added and the limited purpose it was to serve.

A. The Initial Railroad Industry Requests for Legislation.

Section 11503 of the 4R Act had its origins in the "DOYLE REPORT," a national transportation policy study requested by the 86th Congress, one portion of which addressed discriminatory state *ad valorem* property taxation of railroad land and rights-of-way.[10] The report concluded that States commonly assessed land owned by railroads at a proportion of full value (assessment ratio) substantially higher than other property subject to the same tax rates. As one possible solution, the report endorsed an "antidiscrimination law" drafted by the American Association of Railroads (AAR) that would require the assessment ratio applied to railroad property to be no higher than the ratio applied to all other property in the taxing district "subject to the same property tax levy." DOYLE REPORT at 465.

In 1964 and 1966, the railroad industry sponsored legislation closely modeled on the Doyle Report's "antidiscrimination tax

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[9] (...continued)

Railroad Co.); *Hearings on S. 927 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 2 (1968)(statement of Frank H. Weitzel, Assistant Comptroller General of the United States). In short, the history is a single ancestry in which the records over the 15-year period legitimately trace section 11503's full lineage.

[10] Senate Comm. on Commerce, National Transportation Policy, S. Rep. No. 445, 86th Cong. 1st Sess. 445–491 (1961)("DOYLE REPORT").

law."[11] The proposed legislation was narrow: it was addressed to the assessment process only, and it was tailored to relieve railroads from the excessive portion of the tax, no more.[12] The railroad industry did not believe tax rates, other kinds of taxes (*e.g.*, gross receipts or use taxes), or *ad valorem* taxation of railroad personal property and rolling stock resulted in discriminatory overtaxation.[13]

By 1967, the railroad industry no longer believed that Congress could protect it from overtaxation of its real property by addressing only the assessment ratios. The AAR therefore expanded its proposed legislation to address discriminatory tax rates as well. Industry representatives urged that even when assessments were equalized, States could apply a higher tax rate to railroad property by specially classifying it, which would leave the overall tax burden disproportionately high. *Hearings on S. 927 Before the Subcommittee on Surface Transportation of the House Committee on Commerce*, 90th Cong., 1st Sess. 6–7 (1967)(testimony of James Ogden, AAR). As Mr. Ogden pointed out: "property taxes are the result of assessment multiplied by rate." *Id.*, at 7 (testimony of James Ogden). To address the possibility that States might evade the assessment limitations through use of discriminatory tax rates, the legislation contained an added section that would invalidate the

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[11] H.R. 736, 88th Cong., 2d Sess. (1964); H.R. 4972, 89th Cong., 2nd Sess. (1966).

[12] *Hearing on H.R. 736 and H.R. 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 88th Cong,, 2d Sess. 18, 31–33, 51 (1964)(James Ogden, AAR); *Hearing on H.R. 4972 and Identical Bills Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 11 (James Ogden), 45 (Dr. Harold Grove, Professor of Economics, at invitation of AAR) (1966).

[13] *Hearing on H.R. 736 and H.R. 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, at 52 (Ogden).

rate imposed on railroad property to the extent it was higher than the rates on "all other property" in a taxing district. S. 927, 90th Cong., 1st Sess. (1967)(Sec. 25a(c)).

States immediately voiced concern that the comparison class was too broad. They argued to Congress that it was not appropriate to compare the treatment of transportation property to property that, due to unique characteristics that railroad property does not share, is specially taxed for policy reasons (*i.e.*, taxed at lower rates, assessed in some special way, or exempted from taxation altogether). Examples included agricultural land, standing timber and timber property, as well as certain other non-business land (such as homesteads, land owned by veterans, etc.). *Id.*, at 98–99 (testimony of Charles Conlon, National Assoc. of Tax Administrators).[14] The problem was especially acute in the rate section, where railroads might get the benefit of the lowest rate in the taxing district and where the language (unlike the language in the assessment section) arguably would include exempt property in the comparison class. *E.g.*, *id.*, at 100–01 (testimony of Charles Conlon and statements of Senator Magnuson).

Witnesses for the railroads emphasized that the discriminatory feature of State taxation was that it was based on the ownership of the property, rather than what was owned.[15] An AAR spokesman maintained that railroads were not trying to interfere with traditional State prerogatives to give tax exempt status to property or to have special taxing policies based on unique characteristics of certain kinds of property. *Id.*, at 71–72, 82–83 (testimony of James Ogden). He acknowledged that the bill was not clear, however, and

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[14] *See also id.*, at 116 (Letter from F.W.H. Hoefke, Chairman, Oregon Tax Commission) and 119 (Letter from George Kinnear, Director, Washington Dept. of Revenue).

[15] *E.g.*, *id.*, at 11 (James Ogden, AAR), 63 (Paul Sanders, law professor) and 78 (Paul Tierney, Vice Chairman, Interstate Commerce Commission).

that the difficulty was finding language that would address the various tax structures of all 50 States without sweeping too broadly. *Id.*, at 21.

The ambiguities of the comparison class troubled Senator Magnuson, who had introduced the bill. The possibility that the legislation would interfere with State authority to determine what is and is not taxed, and otherwise to further legitimate economic policies through their taxing structures, was a significant concern that he believed had to be "cleared up." *Id.*, at 101.

B. The Process of Refinement.

The same objections to the ambiguity of the comparison class surfaced when the legislation was re-introduced in 1969. *See generally Hearings on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. (1969). By then, the States, the railroad industry and the federal Department of Transportation all seemed to agree that the bill needed clarification. State representatives suggested possible amendments, including that the rate section require a comparison to the "tax rate generally applicable to taxable property"[16] and that the comparison class exclude agricultural and timber land altogether.[17] The federal Department of Transportation urged Congress to limit the comparison class to commercial and industrial property, because the agency thought that the legislation unduly infringed on legitimate State policy prerogatives. *Id.*, at 23–24.[18]

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[16] *Id.*, at 80–81 (testimony of Charles Conlon).

[17] *Id.*, at 101–02 (letter of George Kinnear).

[18] The Department urged that Congress should find an approach "reasonably satisfactory to the States" because of their need to pursue such "worthy objectives as industrial development, preservation of open space, promotion of the quality of life, natural resource policy and so forth." *Id.*, at 23. A compromise was in order: "While the measure of relief to the carriers would not be as great than under S. 2289 as introduced, some limited form of classification

(continued...)

The first major change to the bill came on the floor of the Senate, where members shared the States' concerns that the legislation might create a "new set of inequities" if railroads could take advantage of tax policies unrelated to their property or to efforts to discriminate against them. 116 Cong. Rec. 2023–24 (daily ed. Jan. 30, 1970). The Senate amended the bill to narrow the comparison class so that it would not include agricultural and timber land. *Ibid.* From that time forward, agricultural and timber land remained out of the comparison class in every version of every bill on both the House and the Senate sides.[19]

In 1972, the railroads made a concerted effort to meet the States' objections. The AAR introduced and supported two bills, which in different ways were designed to protect state authority to exempt property from taxation and to further economic goals with their taxing structures.[20] One bill (S. 2841) approached the problem by defining the term "tax rate" to exclude rates or exemptions extended to specified types of property or "for the purpose of promoting the economic development of a taxing jurisdiction or district." Sec 202(b). The other (S. 2362) tied the tax rate comparison to the rate "generally applicable to taxable property in the taxing district." Sec. 27a(3). Both bills incorporated

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[18] (...continued)

would not necessarily be unduly discriminatory in nature. In the Department's view, this compromise approach is justified in the public interest." *Id.*, at 24.

[19] *See, e.g.*, H.R. 16245, 91st Cong., 2d Sess. (1970); S. 2718, 94th Cong., 1st Sess. (1975).

[20] The bills, S. 2362 and S. 2841, were small parts of the omnibus Surface Transportation Act of 1971. *Hearings on S. 2362, Surface Transportation Act of 1971 Before the Subcomm. on Surface Transportation of the Senate Committee on Commerce*, 92d Cong., 1st Sess. (1971, 1972). Transportation industry representatives urged that the bills now met the States' concerns about the comparison class. *See, e.g., id.*, 283–84 (Philip Lanier, Vice President of the Louisville and Nashville Railroad and member of AAR); 323 (Frank A. Smith, Transportation Association of America).

amendments that had been made in 1969 and 1970 at the States' behest, and the language of S. 2362 had even been drafted using the suggestions that State representatives had made in prior years. *Id.*, at 291–92 (testimony of Philip Lanier).[21]

The States agreed that the change eliminated the ambiguity that might have given the railroads a "windfall" in the tax rate comparison. *Id.*, at 209 (testimony of Charles Conlon). The fact that agricultural and timber land now was out of the comparison was also important. *Ibid.* One remaining problem with the comparison class, however, was that railroads could still compare the treatment of their property with non-business and non-income-producing property, such as that of residential homeowners. *Id.*, at 203 (testimony of Charles Conlon).[22] Congressional members suggesting limiting the comparison class to "commercial" property. The States supported the further limitation. *Id.*, at 213 (testimony of Charles Conlon). Railroad representatives for the first time voiced firm objections to narrowing the class. *Id.*, at 287–96 (testimony of Philip Lanier); *see also* 303 (Lanier Letter of January 21, 1972).[23] Congressional members seemed perplexed and frustrated at the railroad industry's unwillingness to be compared with the group to

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[21] Lanier believed that, by requiring comparison to the generally applicable rate on taxable property, the objectionable ambiguity was gone: "[Transportation property] is to be compared only with taxable property — a church is not taxed, we don't get compared; homestead property is not taxable, we don't get compared. If the property is exempted for veterans benefits, we don't get compared with it, because it isn't taxable, and the language of the bill says only taxable property." *Id.*, at 292.

[22] Conlon urged that Congress would put the states in a "straight-jacket" if railroads could claim discrimination on the basis of state tax policies that distinguish income producing property from non-income producing property. *Id.*, at 214.

[23] Lanier viewed other businesses as distinguishable in various ways. For example, he believed that other businesses can move out-of-state, they often get a better rate of return, and they seemed simply to be less concerned than railroads with discriminatory taxation. *Ibid.*

which they seemed most naturally comparable. *Id.*, at 293 (comments of Senators Hartke and Beall).[24] They suggested that the legislation stood little chance of success if it did not contain an acceptable comparison class to test for discriminatory treatment. *Id.*, at 296 (comments of Senators Hartke and Beall). The committee was fully sympathetic to the problem of discriminatory taxation, but it was not willing to correct it by elevating railroads to favored class status.[25]

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[24] The Senators commented:

> Mr. Hartke: What troubles Beall and me is the difficult position in trying to make this type of distinction. Here you are engaged in a business, and then you say, but you don't want it to be treated as a business. . . .
>
> Mr. Beall: That is one of the things that bothers me. I can't just tax you as a nonbusiness when you are a business, even though less than successful.

Id.

[25] The full flavor of the exchange between the Senators and Mr. Lanier is captured best by reading the transcript of the hearing. The following comments from Senator Beall, however, are representative:

> Mr. Beall: I don't think we want to move from discrimination to what appears to be favoritism. We want to move to fairness and equality of treatment.
>
> And it is my impression that if you leave the bill the way it is written now, it is favored treatment, rather than equal treatment, for the railroads.
>
> . . . .
>
> Mr. Beall: I am saying I get the impression that you are discriminated against, and we agree you have been discriminated against in taxation. And you are asking for a change, and there is great sympathy. But the change you are requesting sets up a separate, more favored category for railroads than is available for any other form of commerce or business.
>
> I believe if you really want to bring a change that is going to be acceptable, you are going to come up with a classification that puts you in the same slot as all other business.

Id., at 296.

Several parallel and largely identical bills followed before the provisions finally were enacted through the passage of the 4R Act. In each, the comparison class was limited to "commercial and industrial property." In each, timber and agricultural land remained out of the comparison class. In each, the comparison for assessment disparities was limited to property "subject to a property tax levy." Rate disparities were to be measured by the rates "generally applicable" to the property in the comparison class.[26] Overall, the debate appeared settled. The States voiced no further objection to the comparison class. The railroads seemed resigned to accepting the more narrow comparison as a compromise necessary for passage. There is relatively little discussion of the tax discrimination provision after 1972. The only discussion of the comparison class apparently occurred on the House floor, in 1974. At that point, Representative Long questioned whether the bill would interfere with special tax incentives and exemptions granted by States to encourage economic and industrial development. Representatives Staggers, Adams and Kuykendall all assured him that those policies would not be affected. *See generally* Cong. Rec. H-38373-74 (daily ed., Dec. 10, 1974).[27]

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[26] *E. g.*, H.R. 16281, 92d Cong., 2d Sess. (1972); S. 3945, 92d Cong., 2d Sess. (1972); S. 5385, 93rd Cong., 1st Sess. (1973); H.R. 12891, 93rd Cong., 2d Sess. (1974). The "generally applicable" language was retained in the rate section but, apparently inadvertently, the qualification of "taxable property" was dropped. As is discussed in this section, however, the final version of the bill passed by Congress ensured that the comparison for both rate and assessment claims was tied to property "subject to a property tax levy."

[27] Mr. Long's concern arose because of an tax incentive Louisiana had just granted for a limited period "in order to encourage economic development in the State." *Id.*, at 38373. Several times, therefore, he qualified his description of the State taxing policies he wanted to protect as "temporary" tax benefits extended to promote certain policies. Representatives Adams, Staggers and Kuykendall responded in categorical terms, indicating that the bill would not interfere with these policies at all. They did not draw any distinction based on temporary or long-standing policies. *Id.*, at 38373-74.

C. The Final Language and the Addition of Subsection (b)(4).

Only two substantive modifications were formally discussed in the final few years, one of which is relevant.[28] The final subsection prohibiting "any other tax which results in discriminatory treatment" surfaced inconspicuously and was present in some versions of the bills and not others.[29] Initially, the presence of the provision was not deemed by witnesses on either side to be worth mentioning, and railroad industry witnesses in particular attached no significance to it.[30]

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[28] The other attempted modification was designed to meet the special needs of the State of Tennessee which, through its state constitution, placed railroad property in a special classification for utilities. At one point, Tennessee attempted to amend the legislation so that the comparison class would be either "commercial and industrial" or "utility" property. *See* Cong. Rec. H-38754, 38755 (daily ed., Dec. 10, 1974). The final Senate version of the legislation, S. 2718, would have exempted any State with a then-existing "reasonable classification" provision in its constitution from the reach of the tax discrimination section. S. 2718, 94th Cong., 1st Sess. (1975)(Sec. 207(d)). The House-Senate Conference Committee deleted that provision from the final bill. S. Rep. No. 94-595, 94th Cong. 2d Sess. 166 (1976).

[29] *E.g.*, *compare* H.R. 12891, 93rd Cong., 2d Sess. (1974) *with* H.R. 5385, 93rd Cong., 2d Sess. (1974).

[30] The lack of any substantive significance attributed to the "any other tax" provision is dramatically evidenced by the hearings on H.R. 12891 and H.R. 5385. The two bills were before the same committee simultaneously throughout exhaustive hearings held on the omnibus legislation of which they were a part. The only difference between the antidiscriminatory tax sections of the two was that one (H.R. 12891) contained the "any other tax" subsection, the other (H.R. 5385) did not. The two measures proceeded side-by-side through the hearings (which, transcribed, consume 800 pages) without so much as a single reference to the difference in text or any suggestion that the fourth subsection was of any substantive significance. To the contrary, the witnesses who referred to the two measures described them as if they were identical in scope and effect. *E.g.*, *Hearings on H.R. 12891, H.R. 5385, H.R. 13474, H.R. 10694, and S. 1149 (and all identical and similar bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 2d Sess. (1974)(George M. Stafford, Chairman of the Interstate Commerce Commission) ("H.R. 5385 and H.R. 12891 deal with [tax discrimination] in substantially the same manner."); *id.* at 434 (continued...)

The "any other tax" provision was not mentioned in the hearings until 1975. Approximately two months before the final passage of the 4R Act, the House version of the discriminatory tax section contained a fourth subsection prohibiting "any other tax" that discriminates against transportation property; the Senate version did not.[31] Two representatives of the railroad industry asked the Senate to add the same text to the final Senate bill. Specifically, Stuart Johnson, counsel for the New York Railway, pointed to the House counterpart bill and urged that the Senate version should contain a similar provision forbidding the imposition of "any other tax which results in discriminatory treatment" of rail transportation property. He testified that the provision would protect railroads, like the New York Dock Railroad he represented, that were subject to a gross receipts tax instead of a property tax.[32] Similarly, Stephen Ailes, President of the AAR, testified: "We suggest that the bill should be amended by adding a fourth prohibition, namely, one against taxes that are in lieu of discriminatory property taxes that are covered by the first three prohibitions listed above."[33] The "any other tax" provision was added to Senate version of the bill.[34]

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[30] (...continued)

(Stephen Ailes, President, AAR) ("The provisions of the two bills are substantially the same."). *See also id.* at 379, 462, 467 (various other witnesses testifying to the same effect).

[31] *Compare* H.R. 5385, 93rd Cong., 2d Sess. (1974) *with Railroads — 1975 (Part 5): Hearings on Legislation Relating to Rail Passenger Service, Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 1553 (1975)(Working Draft No. 1).

[32] *Id.*, at 1883.

[33] *Id.*, at 1837.

[34] S. 2718, 94th Cong., 1st Sess. (1975).

The final House and Senate versions of the bill, together with the full 4R Act, went to the conference committee. Most of the committee's report is devoted to other aspects of the 4R Act. It explains, however, that the final version of the Senate bill was adopted in full (complete with the "any other tax" provision), except that the committee deleted a provision that would have exempted from the legislation's reach pre-existing State constitutional provisions providing for a "reasonable classification" of property. *See* discussion *ante* at n.27.

As ultimately adopted by Congress, the statute was particularly straightforward in describing the comparison class. It used a single definition of the term "commercial and industrial property" that applied to both the rate and the assessment provisions:

> "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy.

That was the legislation's final form, which was codified as section 306, and eventually recodified as section 11503.

IV. Carlines' Claim is Not Cognizable Under Subsection (b)(4).

A. History Confirms that Subsection (b)(4) Does Not Reach Property Taxes.

Although there are relatively few pieces of legislative history directly discussing the addition of the "any other tax" or "another tax" provision, those that exist provide ample evidence of Congress's intent. When the relevant pieces are viewed in the context of the section's full 15-year history, what Congress had in mind is all the more certain.

Congress was concerned with a specific burden on interstate commerce: overtaxation of railroad property relative to other commercial and industrial property generally. With respect to

general *ad valorem* property taxes, Congress anticipated in detail the circumstances under which a State's tax on railroad property would and would not be deemed discriminatory. The fourth, "another tax" provision was intended to address the same problem of overtaxation if it occurred as a consequence of some other tax. *See generally Western Air Lines v. Board of Equalization*, *supra*, 480 U.S. at 130.[35] Thus, when Ailes and Johnson asked the Senate to add the provision, as the House already had, they spoke of it only as an "in lieu" tax section, one that would provide a remedy for railroads that were subject to other taxes (*e.g.*, gross receipts) instead of a property tax. Neither they nor any one else (sponsor, opponent, congressional member or committee report) ever suggested at any time that the provision would be an open invitation to raise additional or different challenges to a State's general property tax structure.

B. Subsection (b)(4) is Not a Basis for Testing Exemptions.

Even if subsection (b)(4) may be read to apply to a State's property tax system, it may not be used to challenge aspects of State *ad valorem* property taxation specifically contemplated in and addressed by the first three sections of the statute. *See Gozlon-Peretz v. United States*, 498 U.S. ___, 111 S. Ct. 840, 848 (1991)("A specific provision controls over one of more general application"). At a minimum, the Ninth Circuit should have looked to the statute as a whole for guidance. *Gade v. National Solid Wastes Mgt. Ass'n*, 505 U.S. ___, 112 S. Ct. 2374, 2384 (1992) (plausible interpretations of isolated portions of a statute should be rejected if they are not tenable in light of surrounding provisions). To the extent the structure of the statute demonstrates that while

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[35] The Court in *Western Airlines*, reviewed the legislative history of the 4R Act for light it might shed on later statutes. The Court observed that the language had been used "to describe special taxes on common carriers that operate differently from the generally applicable property tax schemes."

Congress set out to change some State policies, it was equally determined to leave others alone, those choices must be respected. *See West Virginia Hospital v. Casey*, 499 U.S. ___, 111 S. Ct. 1138, 1147 (1991).

Whatever else Congress may have intended, it plainly did not intend a State's *ad valorem* tax on railroad property to be invalidated merely because a State gives tax exempt status to property a railroad happens not to own. In crafting section 11503 as a whole, Congress directly grappled with and answered the question: "Discriminatory treatment compared to what?" In defining the comparison class, Congress gave three answers in the negative: (1) not compared to non-business property; (2) not compared to agricultural and timber land; and (3) not compared to property that States exempt from taxation altogether.

As to the latter limitation, Congress's intent could not be more clear. The comparison class excludes any property "not subject to a property tax levy." Beginning with the DOYLE REPORT, that language was consistently in the subsection addressed to discriminatory assessments. Language like it eventually was inserted into the provision relating to discriminatory rates. By the time the final version of the legislation emerged from Congress, the "subject to a property tax levy" qualification was part of a single definition applicable to both grounds (excessive rates and excessive assessments) for challenging a property tax levy on transportation property. Lower courts uniformly have concluded that this language plainly means what it plainly says: a claim of discrimination may not be predicated on comparing the *ad valorem* tax on transportation property to the "zero" tax on tax exempt classes of property.

See, e.g., Dept. of Revenue, State of Fla. v. Trailer Train, supra, 830 F.2d at 1571-73 (citing and discussing representative cases).[36]

Even if the language left room to doubt Congress's intent, the history removes any uncertainty. The States from the beginning argued that they must have authority to draw lines between what is taxed and what is not. Congress was sympathetic to that need. The railroad industry never suggested that the States' concerns were not legitimate, or that State choices about what was taxed and what was not in any way discriminated against railroads. Ultimately, clarification of the language to ensure that State prerogatives in this area were not affected was a key refinement of the comparison class that the railroad industry itself offered up.

In narrowing the comparison class, Congress effectively preserved for States the bulk of their traditional authority to structure their tax systems free of federal interference. This Court repeatedly has insisted that States be given wide latitude "in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *E.g., Lehnhausen v. Lake Shore Auto parts Co.*, 410 U.S. 356, 359 (1973)(equal protection challenge to state tax). The point of not interfering with those judgments is to ensure that States are free to raise revenue in ways that best suit the diverse circumstances of their population, wealth, natural resources and local economies. *See generally, Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 512-15 (1937); *Lehnhausen*, 410 U.S. at 359-65. For purposes of section 11503, Congress determined States should have full leeway to apply special taxing policies (*i.e.*, lower rates and assessment ratios) to agricul-

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[36] The Eleventh Circuit's discussion of the "subject to a property tax levy" language is particularly thorough. The court went on to conclude that a claim under subsection (b)(4) may include an examination of exempt property, a conclusion we do not endorse in citing to the first portion of the court's analysis.

tural and timber land; they should have full leeway to treat business and non-business properties differently; and they should have full leeway to decide what is or is not taxed. Congress chose to interfere with State prerogatives only to this extent: within the comparison class defined by Congress, States cannot impose a higher tax burden on railroad property than is imposed on the comparison property generally. Within the "class" to which Congress believed railroad property is similarly situated for purposes of comparison, States owed the railroads a level playing field.

Accordingly, subsection (b)(4) cannot be used to challenge a tax on transportation property based on a State's choice to leave some property tax exempt, any more than it can be used to challenge the failure to give transportation property the tax treatment given to agricultural and timber land, or to non-business property. Those challenges simply are foreclosed by the choices Congress made in defining the comparison class in the first three subsections. For the Ninth Circuit to reopen the comparison and fold exempt property back into it nullified the specific policy choices Congress made in the subsections prohibiting discriminatory *ad valorem* taxes expressly.[37] In the process, the court necessarily and improperly "reduced them to trivial application." *See United*

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[37] Significantly, although the Ninth Circuit and plaintiff carlines were willing to fracture the comparison class by bringing tax exempt property back into the comparison, neither the court below nor carlines has ever suggested that the other excluded property (timber and agricultural land, non-business property) could properly be in the comparison. If the choices reflected in the first three subsections have no bearing on the application of the "another tax" provision, it is difficult to see why the comparison class would not be open to these other categories of property as well. The fact that neither the Ninth Circuit nor carlines suggest the comparison under subsection (b)(4) can be so freely re-examined is tacit acknowledgment that the policy choices in the first subsections must be respected. Yet, they offer no principled basis for disrespecting the congressional choice to not to compare railroad property to tax exempt property.

States v. Nordic Village, *supra*, 112 S.Ct. at 1015. All States rely heavily on *ad valorem* property taxes, and no State does so without exempting at least some classes of property. If subsection (b)(4) is available for "exemption discrimination" claims, the statute contains no incentive for a railroad ever to proceed under the subsections addressed to assessments and rates, at least not without throwing a claim of "exemption discrimination" into the complaint as well. A railroad need never be content merely to demand equalization in relation to all other commercial and industrial property that is subject to a property tax. The comparison class can routinely be expanded by proceeding under subsection (b)(4), with the result that the average rate of tax and the average assessment ratio will always be lower because the calculation will include property that effectively bears a "zero" tax.

In concluding that a claim for "exemption discrimination" can be brought under subsection (b)(4), the Ninth Circuit missed the mark completely. The court relied on *dictum* from an Eighth Circuit opinion in which that court asserted that the purpose of section 11503 "was to prevent tax discrimination against railroads in *any form whatsoever*." *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981)(emphasis added by Ninth Circuit, Pet. Cert. App-10). In like fashion, other courts have cited *Ogilvie* as authority to say that Congress was concerned with tax discrimination against railroads "in all its guises"[38] and "by any means."[39] But the Eighth Circuit in *Ogilvie* relied more on intuition and less on an actual examination of the statute's history. Congress's objective was not nearly so

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[38] *Southern Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), in turn cited by *Department of Revenue, State of Florida v. Trailer Train Co.*, *supra*, 830 F.2d at 1573.

[39] *Alabama Great Southern R. Co. v. Eagerton*, 663 F.2d 1036, 1039–40 (11th Cir. 1981).

sweeping. To the contrary, it consciously and scrupulously declined to ride roughshod over the States in their efforts to fashion rational taxing policies. The refinements the statute went through over its 15-year history were designed to craft it so it would fully reach the problem of overtaxation as Congress defined it, but also so it would reach no further. *Ogilvie*'s observation that the statute was intended to address tax discrimination "in any form whatsoever" is purely apocryphal.

C. The Statute Should Not be Judicially Expanded to Address Some Perceived Potential for Abuse.

The arguments for reading subsection (b)(4) to open federal court doors wide to any and all claims of discriminatory railroad taxation are policy driven, not text or history based. With respect to *ad valorem* property taxation, it is possible to posit hypothetical ways States might circumvent the limitations Congress placed on them in the first three subsections. In particular, it is easy to speculate that States might opt to give tax exempt status to all property except railroad property, thus leaving only railroads subject to the State's *ad valorem* tax.[40] There are, however, at least three reasons why fears of that type do not warrant a judicially expansive construction of the statute.

First, the fear is more imagined than real. The prospect of any State applying its *ad valorem* tax to railroad property only, or even to railroads in conjunction with only a small class of interstate industries, is fanciful. Congress was well-aware of the States' heavy dependence on property tax revenues and the small proportion that derives from taxes on railroad property. *See* DOYLE REPORT 459 (noting that local governments rely on property taxes for 87% of their tax revenues, only about 2.4% of which is from taxes on railroad property). As a practical matter, tax revenues from railroad

[40] *See, e.g.*, Brief of the Solicitor General in Support of Cert. Pet. at 10.

property, although important, represent too small a share of the commercial and industrial property tax base for States to exempt everything else. That is especially true in States that lack either a sales tax (*e.g.*, Oregon) or an income tax (*e.g.*, Washington), where property tax reliance is especially great.[41] At most, exempting all property except that owned by railroads is an unforeseen, and as yet unrealized, possibility flowing from the congressional decision to leave State tax exemption authority unaffected. That is not a sufficient reason for refusing to give effect to the statute's plain meaning. *Union Bank v. Wolas*, 502 U.S. ___, 112 S.Ct. 527, 531 (1991).

Second, whatever the wisdom of the congressional design for protection from discriminatory taxes, it is without question the design Congress chose. Congress exhaustively examined state *ad valorem* taxation of railroad property, and it determined in what specific ways State authority should be limited. With respect to State authority to remove property from the tax rolls altogether, Congress consciously adopted a "hands-off" policy. Indeed, Congress was not even asked to interfere with that authority. The problem with the legislation from the beginning was ambiguity; the challenge was finding acceptable language. The railroad industry did not voice so much as one objection to the examples of property that States argued they should be free to tax specially, which included standing timber and business inventory (the major

[41] In 1988, Oregon levied approximately $2.19 billion in property taxes. Of that, roughly $790 million was levied on commercial and industrial property. *See generally* OREGON PROPERTY TAX STATISTICS, Compiled by Research Dept, Oregon Department of Revenue (1988-89). Railroads contributed about $9 million, or 1.1 percent, to the commercial and industrial total.

categories of exempt property in Oregon).[42] Rather, the railroads themselves offered up a solution and clarified the bill to ensure that tax exempt property was out of the comparison class. If Congress, in adopting this policy, was short-sighted, there was short-sightedness enough to go around. If the railroad industry believes both it and Congress gave the States too much leeway, the solution is to return to Congress in light of their new experience. Whether they can now convince Congress that they appropriately should be considered comparable to standing timber, business inventory, bees and fur-bearing animals is speculative. Their argument, however, should be made to Congress, not to this Court.

Finally, whatever the Court's willingness in the abstract to construe statutes to avoid problems that did not concern Congress, the Court should be particularly averse to that approach here. Section 11503 does not exist as an isolated statement of congressional policy on the subject of state taxation. Rather, it was enacted against the backdrop of and as an exception to the Tax Injunction Act (28 U.S.C. § 1341), which generally precludes federal courts from interfering with state taxing authority. That Act reflects Congress's respect for the States' role as co-equal sovereigns and its recognition that "the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts." *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100, 102–03 (1981). To be sure, Congress intended the discriminatory tax provisions of the 4R Act to stand as an express exception to the Tax Injunction Act. *See* § 11503(c). As an exception to a more encompassing policy, however, section 11503

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[42] *See, e.g., Hearings on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 100 (1969)(letter from George Kinnear); *Hearings on S. 927 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 97–98 (1967)(testimony of Charles Conlon and remarks of Senator Magnuson).

should be read to extend only to those circumstances Congress clearly contemplated and chose to address, not to those where Congress's policy is uncertain or, worse, to those Congress never considered. *See Chesapeake W. Ry v. Forst*, 938 F.2d 528, 531 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1577 (1992)(courts should not disregard the general policy of non-interference in state taxation except where § 11503 plainly authorizes that interference).

As this Court has concluded, the balance to be struck between Commerce Clause authority and sensitive state interests is largely committed to the political process itself, and in particular to the national legislature. *See Garcia v. San Antonio Metropolitan Transit District*, 469 U.S. 528, 550–52 (1984). Subsection (b)(4) obviously survived the political process because nothing in its plain language or in the representations of those who urged its addition remotely suggested that the years of clarification and compromise that shaped section 11503's primary substantive provisions would be overshadowed by this seemingly unremarkable add-on. If the political process is the protection the States must look to, then the political process must be respected. Plain language must be given force, complete with its political trade-offs and the incomplete protection it may hand those who ask Congress to encroach on powers basic to state sovereignty. The doubts created by silent or uncertain records of legislative intent must be resolved in the States' favor. To unravel the carefully constructed fabric of section 11503 as a whole on the basis of the unarticulated and undebated policies that carlines' would now read into subsection (b)(4), and to do so in an area as delicate as state taxing authority, is not an acceptable balance to strike in federal-state relations.

V. The Test for Discrimination.

A. The Ninth Circuit's *Per Se* Test Was Wrong.

Even if subsection (b)(4) may be used to challenge property taxes, and even if railroads may seek to compare themselves to tax exempt property, the question remains: under what circumstances is it discriminatory for a State to exempt some classes of property without also exempting transportation property? The Ninth Circuit held that "any exemption not also available to railroads violates the statute." Pet. Cert. App-17. It thus announced a *per se* rule of discrimination, one that no other federal or state court has ever endorsed.

That test for discrimination is wholly indefensible. Whatever may be said of the breadth of the "another tax" subsection and the limitations of subsections (b)(1) through (b)(3), one conclusion is beyond quarrel: Congress deliberately crafted the statute so that a State's policy choice to give tax exempt status to specific classes of property could not be used to invalidate either the tax rates or assessments applied to railroad property. Necessarily, Congress assumed that States would *both* tax property owned by railroads and exempt other property from any taxation. The Ninth Circuit's holding that any exemption renders any tax on railroad property discriminatory could not be more at odds with Congress's design.

B. A State Law Discriminates Against Transportation Property If Singles That Property Out For Excessive Taxation.

The term "discrimination" is not self-defining. The notion that someone or something is subjected to "discriminatory treatment" reflects, at bottom, a policy choice about the basis on which it is and is not permissible to treat people or things differently. Subsection (b)(4) does not, by its terms, provide any standard for "discriminatory treatment." It supplies no test for the discrimination, it identifies no comparator or comparison class, it contains no provision for specific relief.

The remainder of the statute, however, fills those voids. *See King v. St. Vincent's Hospital*, 503 U.S. ___, 112 S. Ct. 570, 574 (1991)(context supplies the meaning of statutory terms). Even within the comparison class, transportation property never is given the same tax rate or assessment as the most favorably treated property in the comparison. Rather, transportation property always receives the benefit of some hypothetical average, even then only by comparison to a carefully limited class of property. Thus, privileges directed to distinguishable groups of taxpayers do not prove discrimination. Discrimination depends instead on singling out transportation property for more severe taxation than similarly situated property bears on average.

The legislative history underscores what the statute itself makes clear. The railroad industry came to Congress complaining that it was discriminated against because railroads were often singled out for a heavier tax burden by virtue of their status as railroads. The industry objected to being placed in a special class for tax rate and assessment purposes. It was unfair, they argued, to tax railroad property more heavily because it was owned by railroads, rather because of the character of what was owned.[43] At the same time, the railroads repeatedly denied that they wanted the benefit of the kind of special taxing policies reflected in the tax breaks and tax exempt status that States give to some classes of property in order

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[43] As several witnesses testified: "The question is, Do you take the character of the owner and discriminate against him when that owner happens to be an interstate carrier?" *Hearings on S. 927 Before the Subcomm. on Surface Transportation of the House Comm. on Commerce*, 90th Cong., 1st Sess. 63 (1967)(Paul Sanders, Law Professor, Vanderbilt University). The bill "would not permit a classification on the basis of ownership to the detriment of the interstate carrier. The interstate carrier could not be treated more disadvantageously." *Ibid.* The provisions are designed to "put an end to the widespread practice of treating for tax purposes the property of common carriers on a different basis than other property in the same taxing district." *Id.*, at 78. (Paul Tierney, Vice Chairman, Interstate Commerce Commission).

to further local social and economic policies.[44] Congressional members time and again concurred. They agreed railroads should not be marked for higher taxes on the basis of their status as railroads.[45] They did not, however, want to interfere with the special taxing policies States often extend to uniquely situated property, nor did they want to elevate railroads to favored class status by giving them the benefit of taxing policies that had no application to transportation property.[46] In short, discrimination resulted from specially burdening railroad property on the basis of its ownership, not from extending tax benefits to other property based on the character the other property.

Congress's objective in enacting section 11503 fits comfortably with conventional understandings of when State taxing practices burden interstate commerce. As the amicus brief filed by the National Governors' Association, *et al*, discusses in some detail, under traditional Commerce Clause principles, a facially neutral state tax is an invalid burden on interstate commerce only if it has a clearly differential impact on out-of-state commerce and lacks a legitimate justification. *E.g.*, *Amerada Hess v. New Jersey Division of Taxation*, 490 U.S. 66, 75 (1989). The legitimacy of the justification, in turn, depends on whether it is independent of the out-of-state character of the business taxed, as for example when

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[44] For example, James Ogden explained: "We are really trying not to, you might say, not to put railroads in a special class. We are trying to get out of being a special class." *Id.*, at 20–21.

[45] As Senator Magnuson aptly observed, the point was to avoid "pick[ing] them out for picking." *Id.*, at 98.

[46] For example, Senator Magnuson, who introduced several of the bills for the AAR, expressly rejected the idea that special tax breaks designed to promote economic growth and similar policies were discriminatory if not extended to railroad property. The Senator pointed out that the railroads themselves had been the beneficiaries of similar special policies as States tried to attract railroad development. *Id.*, at 101.

the tax is justified by differences in the nature of the businesses bearing or not bearing the tax. 490 U.S. at 79.

The structure of section 11503 as a whole, the congressional purposes underlying the statute, and general Commerce Clause principles are congruent in suggesting the appropriate analysis. The essential inquiry should be whether the tax is facially neutral and generally applicable, or whether it falls on railroads alone or as one of a relatively small and insular group. Congress recognized that railroads were easy prey for discriminatory taxation because they do not vote and are not easily moved to friendlier climes. *Western Air Lines, Inc. v. Board of Equalization, supra*, 480 U.S. at 131 (examining history of 4R Act and the overall objective of section 11503). When railroads are taxed as a constituent part of a large and diverse group of local and out-of-state taxpayers, they cannot have been singled out for a uniquely heavy tax burden.[47]

Conversely, a State tax could lose its neutral character if it applied to railroad property only, either by reference to the property's ownership or because its terms were directed to characteristics so narrow and finite that they effectively describe only railroad property.[48] Such a tax would single railroads out on the basis of their status as railroads, rather than treat them in common with other similarly situated taxpayers.[49]

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[47] The principle is familiar, with roots almost as old as the Republic. *E.g.*, *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819); *accord Washington v. United States*, 460 U.S. 536 (1983); *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 185, n.2 (1938).

[48] An example would be a law imposing an exceptionally high property tax rate on any parcel of land less than 40 feet wide and more than one mile in length.

[49] *See, e.g.*, *Western Airlines v. Bd. of Equalization, supra*, in which South Dakota's tax, although valid for other statutory reasons, applied only to airline flight property.

C. Oregon's tax on transportation property is not discriminatory.

The Ninth Circuit's *per se* test was one that neither Oregon nor any State could pass; all States have *ad valorem* property tax systems and all States exempt some property from their reach. Correctly analyzed, however, Oregon's *ad valorem* tax on transportation property easily survives carlines' challenge, as the district court found.

The district court examined the neutrality of Oregon's tax structure from a variety of vantage points. It observed that there is no *de jure* discrimination, because Oregon applies the same tax rate and assessment ratio to all taxed property, regardless of type. Pet. Cert. App-28. The court also scrutinized the tax structure for what it described as "*de facto*" discrimination by inquiring into the nature and pattern of Oregon's system of exemptions. The court examined standing timber and business inventories in particular, and concluded that they did not reflect "backdoor" discrimination. Rather, for "independently valid reasons," they receive either totally exempt status (business inventory) or are taxed under an alternative tax structure (the severance taxes applied to timber when harvested). Pet. Cert. App-30–32. Finally, the district court rejected carlines' claim that the percentage of property that is exempt is so great that, due to percentages alone, the tax on carlines' property is discriminatory. The court assumed, for purposes of argument, that there might be a point at which percentages alone could prove a case, but it found that the percentage here was far lower than carlines claimed. Pet. Cert. App-29–32.

The district court's analysis was correct, and the Ninth Circuit should have affirmed the judgment. Oregon's *ad valorem* property tax system is in all respects generally applicable and neutral on its face. As a starting proposition, Oregon taxes all non-exempt

property using a single assessment ratio (100% of fair market value) and a single rate of tax within the each taxing district. Oregon's system does not distinguish real and personal property, it does not provide for differential rates of any kind (not even as between residential and commercial properties), it does not adjust the assessment ratio upward or downward for any category of property. *See generally* Or. Rev. Stat. §§ 307.030; 308.250 (1987). The state Department of Revenue has special responsibility to assure uniformity of assessment and property valuations throughout the State. Or. Rev. Stat. § 306.120 (1987). Oregon has extensive procedures to ensure statewide equalization. Or. Rev. Stat. §§ 309.010 *et seq.* (1987).

Of course, as in all tax structures (federal as well as state), Oregon provides for numerous exceptions to the application of *ad valorem* property taxes. Some of the exempt property bears no other tax; some is subject to an alternative form of tax or fee. Because carlines own only personal property, their lawsuit focused exclusively on personal property exemptions. Among those, the major exemptions (in terms of value, not number of affected taxpayers) are standing timber and business inventory. Far less significant, but also in the exempt personal property category, are motor vehicles, agricultural machinery, poultry, livestock, bees and fur-bearing animals.

As the district court concluded, nothing in the nature or the pattern of the tax exempt classes supports an inference that transportation property has been singled out for unusually burdensome treatment. To the contrary, the major categories of exempt property in Oregon are precisely the categories Congress determined States should be free to exempt. During the congressional hearings, the States pointed specifically to business inventory and standing timber. Both served as examples of property that is uniquely situated and frequently justifies special taxing policies for

social and economic reasons (*i.e.*, timber is productive when mature enough to harvest; inventory produces income only when sold).[50] Carlines did not argue that those policies are illegitimate, that the exemptions lack an independently valid purpose, or that they somehow are a pretext for discriminating against transportation property. Their only claim was, in effect, that favoritism directed to categories of property they do not own, no matter how distinguishable that property, is discriminatory if not extended to transportation property as well. That is an argument Congress flatly rejected.

Beyond that, carlines have done no more than attempt to parse the tax base in a way that creates a distinction Oregon's tax laws do not make.[51] By virtue of percentages and numbers only, carlines attempt to suggest that transportation property is subject to *ad valorem* taxation while nearly all other property is not. As carlines approach the analysis, it is irrelevant that the property Oregon exempts is meaningfully different from the property that is taxed, including carlines' property. Similarly, it is irrelevant that scores of other types of business personal property owned by thousands of voting taxpayers also is taxed.[52] Carlines merely fashioned a

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[50] *See* n.42, *supra*.

[51] Specifically, carlines consistently separate real from personal property and discuss only the percentage of exempt property in comparison to all potentially taxable business personalty. That line is artificial. Oregon's tax structure is not set up to make any distinction between business real and personal property, and there is no reason why it should be analyzed as though it does, other than to distort the inquiry. Without that division, the inflated percentages on which carlines rely largely evaporate.

[52] In Oregon, the railroad industry generally is part of a particularly vast group of voting taxpayers. As already described, Oregon's tax system does not distinguish between real and personal property for rate or assessment purposes, nor does it distinguish between business and non-business real property. Thus, in terms of political clout, railroads are part of a group that includes residential homeowners and similar groups that form an enormously broad local voting

(continued...)

subset of property that cast their figures in the light most favorable to them. Carlines then calculated the percentage of property exempt from that taxation within that convenient subset. For purposes of this Court's review, it should suffice to say that neither the district court nor the Ninth Circuit accepted carlines' totals as accurate. The district court found, and the Ninth Circuit assumed, that transportation property is taxed in common with a large majority of other taxpayers. The approach carlines advocate is, in any event, seriously flawed. If a State's tax is generally applicable and neutral in its terms, and if there is an independently valid reason for the alternative tax treatment given other categories of property, that should be the end of the inquiry. Oregon meets those tests.

VI. The Remedy the Ninth Circuit Ordered Is Not Authorized By Section 11503.

The Ninth Circuit dealt its final blow to the statute and the policies it is designed to further by enjoining any taxation of carlines' property, rather than enjoining the tax to whatever degree it exceeded of the average tax born by commercial and industrial taxpayers. The state urged below that the language and history of sections (b)(1) through (3) entitled Carlines to no more than a proportional reduction of their taxes (*i.e.*, equalization). Having concluded that it need not consider the language of the preceding sections or the history of the Act in deciding subsection (b)(4)'s reach, the circuit court fashioned its remedy with the same lack of constraining principle. The court specifically rejected guidance from

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[52] (...continued)

majority. That is perhaps best demonstrated by the fact that three years ago Oregon voters passed an initiative measure placing severe limits on the amount of real property taxes the State may levy. Or. Const. Art. IX § 11b (1990). Although the momentum for that reform came in large part from residential homeowners who were frustrated with the particularly high property taxes Oregon taxpayers bear due to the lack of a sales tax, railroad land receives the full benefit of the cap on property taxes.

its own opinions interpreting other provisions of the antidiscriminatory tax section in light of the legislative history,[53] stating they provided "no support" for a proportional remedy under subsection (b)(4). Pet. Cert. App-19. Relying only on *Trailer Train Company v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), the court agreed with the Eighth Circuit's conclusion that "railroads subject to a discriminatory tax [a]re entitled to the same total exemption preferred property owners enjoyed."[54] The Ninth Circuit ordered that the collection of any tax against carlines' property be enjoined. *Id.* Once again, the court could hardly have shown less fidelity to the language and the history of the statute.

Subsections (b)(1) and (b)(3) provide relief from the excessive portion of a discriminatory tax only. In its original form as subsection 306(1)(a), the statute stated that overassessment of railroad property is prohibited "but only to the extent of any portion based on excessive values as hereinafter described."[55] Similarly, the original form of subsection 306(1)(c) prohibited levying or collecting "any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally

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[53] *E.g.*, *State of Ariz. v. Atchison, Topeka & Santa Fe Railroad*, 656 F.2d 398, 404 (9th Cir. 1981) (citing legislative history and concluding under subsection (b)(1) that the comparison should be to the average taxpayer).

[54] There is more than a little irony in this formulation. Oregon does not exempt on the basis of the ownership of property. As a result, although Oregon extends preferences to specified classes of property, the tax structure does not establish any class of "preferred [that is, exempt] property owners." The only class of preferred property owners in Oregon exists by virtue of the Ninth Circuit's decision, *i.e.*, railroads and affiliated industries.

[55] This language was omitted from the statute in recodification. As the Court has pointed out, however, the recodification "'may not be construed as making a substantive change in the laws replaced.'" *Burlington N. R. Co. v. Oklahoma Tax Comm'n.*, *supra*, 481 U.S. at n. 1 (1987)(*quoting* 92 Stat. 1466 § 3(a)). Accordingly, the language from the legislation as originally codified is germane here.

applicable to commercial and industrial in the same assessment jurisdiction." Thus, the statute plainly provided, and lower courts have easily understood it to provide, that a court may enjoin only the tax in excess of the hypothetical average tax on property in the comparison class.[56]

History confirms that Congress consciously gave the federal courts authority to enjoin "only the discriminatory portion, that is, the excessive value part of the assessment . . . ." S. Rep. No. 91-630, 91st Cong., 1st Sess. 10 (1969). Congressional reports on the legislation unambiguously stated that the assessment comparison was to be to the "hypothetical 'average' taxpayer." *Id.* Those official sources left no doubt that carriers were not entitled to demand the lowest assessment granted to any parcel in the taxing jurisdiction.[57] The same is true of rate discrimination. The States were concerned that the rate provision as initially drafted would entitle railroads to the lowest rate applied to any property in the taxing district.[58] As a result, they asked for and received clarifying language stating that railroads were entitled only to the rate

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[56] *See, e.g., Clinchfield R. Co. v. Lynch*, 700 F.2d 126, 131 n. 6 (4th Cir. 1983)(viewing statute as containing a "clear mandate" that tax be enjoined only to the extent of the overtaxation); *Ogilvie v. State Bd. of Equalization*, *supra*, 657 F.2d at 210.

[57] The committee report stated:

> Thus, the words "all other property" are to be construed as meaning property in the aggregate, and not individually as separate parcels or kinds of property. The reason is obvious since, if the latter were the case, the carrier would be entitled to look for the particular parcel of property in the taxing district which was assessed lowest of all (that is at a lower percentage of its true market value than the percentage applicable to any other parcel in the entire district) and demand similar treatment. This is not the purpose of the legislation . . . .

Id. at 26.

[58] *See Hearings on S. 927 Before the Subcomm. on Surface Transportation of House Committee on Commerce*, 90th Cong., 1st Sess. 99 (1967) (testimony of Charles Conlon).

generally applicable in the taxing district.[59] With the remedy it gave carlines in this case, however, the Ninth Circuit ordered that which Congress expressly considered and rejected: the tax treatment afforded the most favored taxpayer.

It is discouraging that carlines would ask for and defend that extreme remedy when, before Congress, the railroad industry emphatically disclaimed any objective to be freed from state *ad valorem* property taxes. It was, after all, the AAR that offered up the initial "antidiscriminatory tax law" as an alternative to the Doyle Report's primary recommendation of exempting railroad rights-of-way from state taxation altogether. DOYLE REPORT, *supra* at 465. Time and again, railroad representatives assured Congress that they were seeking tax equalization, not freedom from taxation.[60] Although the industry apparently recognized the futility of seeking tax immunity through the political process, it has no

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[59] Charles Conlon proposed that the rate comparison be amended to provide that railroads should receive the be the "tax rate generally applicable to taxable property." *Hearing on H.R. 16245 [and other bills] Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 99-100 (1970). Section 306(1)(c) ultimately referred to "the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction."

[60] For example, when asked by one congressional member if he was suggesting that railroads should not pay taxes, James Ogden replied:

> Oh, no sir. . . . We take it as a privilege as far as our company is concerned and all others that I know anything about to pay taxes. We insist that we are good citizens everywhere we operate, and we never stand back from anybody on paying taxes. We think it is our duty to do it and our privilege to do it. But I object to paying too much and more than the other fellow.

Hearing, on H.R. 736 and H.R. 10169 Before the Subcomm. on Transportation and Aeronautics, Comm. on Interstate and Foreign Commerce, 33 (July 28, 1964). *Accord Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 51 (1969)(testimony of Thomas Goodfellow, President of AAR).

hesitance in attempting to achieve that previously forsworn end through the courts.

Whatever the class of property to which railroad property is ultimately compared, one point is beyond dispute: Congress intended that railroads would pay the same taxes the "average" commercial taxpayer pays. The Ninth Circuit's remedy is correct only if, in Oregon, that average taxpayer pays no taxes. For the reasons already discussed, carlines' complaint was properly dismissed. Even if, however, carlines may pursue this claim, they are not entitled to the windfall the Ninth Circuit handed them. Therefore, if this Court does not reverse the Ninth Circuit and affirm the judgment entered by the district court, at a minimum the Court should remand the case for a correct remedy.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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